



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-84-96

FACTS:

You are a member of the Town of ABC's Planning Board (Board). The Town has a zoning by-law which would allow the building of a Planned Residential Community development ("development") upon the granting of a special permit by the Board. An application for a special permit has recently been submitted by a developer for the building of such a development. You own a piece of property which abuts the proposed development. You state that by virtue of the location of your property you are a "party in interest" as that term is defined in G.L. c. 40A, and thus entitled to notice of the public hearing on the permit and decision of the Board.

QUESTION:

Does G.L. c. 268A permit you to participate as a Board member in a decision on the issuance of a special permit where you own land which abuts the proposed development?

ANSWER:

No.

DISCUSSION:

As a member of the Board you are a municipal employee and therefore subject to G. L. c. 268A. The provision of that law which is relevant to the question you have raised is s.19. Section 19(a) provides in pertinent part that a municipal employee may not participate^[1] as such an employee in a particular matter^[2] in which he or a member of his immediate family has a financial interest. A decision by the Board to issue or deny a special permit is a particular matter in which you ordinarily would participate. The critical issue, then, is whether because you own land abutting the land to be developed, you have a financial interest in the decision. The commission concludes that you do.

The principal object of zoning is to protect the property of others.^[3] Whenever a change is contemplated, either by way of a variance or a special permit, the property rights of owners in the area of the proposed change are implicated, and certain rights to due process attach. In Massachusetts this takes the form of notice of the proposed change, the holding of a public hearing, and notice of the decision. With respect to those property owners whose rights will be most significantly affected by the issuance of a special permit, G.L. c. 40A, s.11 provides that they be given individual notices of the hearing and the decision. These so-called "parties in interest" are defined in s.11 in pertinent part as ". . . abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner..." It requires no great leap to find that where one's property rights stand to be significantly affected the value of those rights also stands to be affected. Thus, one's financial interest is implicated. This certainly is true where the person in question is considered a "party in interest" as that is defined in s.11. There is no requirement in G.L. c.

268A, s.19 that the financial interest prohibiting participation be a substantial one,[4] nor is there any requirement that it be a financial interest that is realized. Such interests would include, but are not limited to, increases or decreases in the value of the property, or upward or downward revisions in property tax assessment, In the case of a Board member voting on the issuance of a special permit, a vote either way affects a financial interest since an affirmative vote may result in the issuance of the permit with its concomitant effect on property rights, and a negative vote may result in a permit denial and thus a maintenance of the status quo.[5]

Section 19(b) contains exemptions to the s.19(a) prohibition, but the Commission concludes that neither of the two relevant ones is available to you. The first provides that a municipal employee may participate in the matter if his appointing official first determines that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee. This exemption is not available to elected officials because they do not have appointing officials.[6] The second exemption applies to those particular matters which involve determinations of general policy, and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality. It may be true that the majority of the citizens of ABC including yourself would be affected by the granting of a special permit because taxes might be lowered or the character of the town might change. However, your interest, by virtue of the location of your property, is distinct from theirs, Again, G.L. c. 40A, s.11 makes the distinctiveness of your interest clear, You have stated that both by-law and G.L. c. 40A, s.9 require an affirmative vote of four members of a five member permit granting authority such as the board. Therefore if you do not participate in the matter, a unanimous vote of the four eligible members would be required, Although a rule of necessity has been recognized by the Massachusetts courts in several cases, "[T]hat rule is not brought into play by the mere absence of a member or members, however," *Graham v. McGrail*, supra at 138. Moreover, the rule is "inapplicable when a way can be found to provide a qualified tribunal, as by excluding from the tribunal the disqualified. . . member [or] by counting only the votes of members who are qualified." 2K Davis, Adm. Law 12.04(1958) (citations omitted). The rule should only be utilized where so many members of a tribunal are disqualified that the body is incapable of acting because an insufficient number remain to constitute a quorum. In the situation you describe, the four remaining Board members are not unable to act because of an insufficient number, Consequently you would only be able to participate if another member were disqualified from participation and not merely absent from the Board meeting at which the matter is considered. The fact that there may be not unanimous agreement among the four remaining members as required by G.L. c. 40A, s.9 is not a reason to invoke the rule of necessity. See, EC-COI-82-10.

DATE AUTHORIZED: August 14, 1984

[1] For the purposes of G.L. c. 268A, s.1(j) "participate" is defined as to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. To participate "even in the formulation of a matter for vote is to participate in the matter... [t]he wise course for one who is disqualified from all participation in a matter is to leave the room." *Graham v. McGrail*, 370 Mass. 133,158(1976). The Court goes further to say that "[W]e do not think [such a person] can be counted in order to make up a quorum." *Id.* at 138 (citations omitted).

[2] For the purposes of G.L. c. 268A, "particular matter" is defined as any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim,

controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. . . G.L. c. 268A, s.1(k).

[3] See e.g. *Hammond v. Board of Appeal of Springfield*, 257 Mass. 446,448(1926): see also, J.A. McCarty, "Zoning and Property Rights." 48 Mass. L.Q. (1963) at 473.

[4] Quite the Contrary, it is quite clear that the General Court meant the term to encompass even those interest that are minimal. See e.g. W. Buss, "The Massachusetts Conflict of Interest Law," 45 B.U.L. Rev. 299, 361 (1965): R. Braucher, *Conflict of Interest in Massachusetts in Peerspective of Law, Essays for Austin Wakeman Scott*, (1964). at p.25.

[5] Even if you were not a statutorily defined "party in interest" but owned property in close proximiry to the proposed development, your participation would raise serious questions under G.L. c. 268A, s.19 and and s.23(paragraph 2)(2) and (3).

[6] See *District Attorney for the Hampden District v. Grucci*, (1981) Mass. Adv. Sh. 2125,2128, n. 3. In 1982, the General Court considered comprehensive legislation filed by the Commission which, in part, would have provided an exempting avenue for elected municipal officials under s.19. See, 1982 House Doc. No. 1235, s.16. This particular proposal was not approved.